SUMMARY

Chapter I.

In the first chapter we opened our considerations with a discussion of the notions „custom" and „customary standard". We traced the factual element — the behaviour — and the intellectual element — the conviction that this behaviour conforms with the legal norm — in the decisions of the courts and concluded that a custom can only be relevant in law if, during a more or less considerable time, the vast majority of the group concerned acts in conformity with the custom. In this respect there appeared to be an analogy between a custom and a customary standard.

Chapter II.

In the second chapter we considered articles 3 and 5 A.B., as well as articles 1375 and 1383 B.W. (Articles 1135 and 1160 C.c.), so important in the law of contracts. As to article 3 A.B. it appeared that the courts, at all events as far as civil law is concerned, adhere most strictly to (the words of) this article and enforce customs only if the law refers to them. We argued nevertheless that article 3 A.B. does not forbid taking a custom into account in establishing the meaning of the so-called „vague standards". We illustrated our point of view with a number of decisions on the subject of the law of tort. As far as article 5 A.B. is concerned we found that the courts in most cases deny legal validity to the law-abolishing custom.

Having shown that articles 1375 and 1383 B.W. have been derived — via the French Civil Code — from pronouncements of DOMAT (1625-1695) and POTHIER (1699-1772), we discussed the several questions to which these articles have given rise. In the first place we demonstrated that both the custom of article 1375 B.W. and the customary standard of article 1383 B.W. may be general as well as local, and that both moreover may be restricted to a certain trade or profession. Then again we argued that the customary standard bears not only on written stipulations but also on oral ones. Furthermore we learned that the „nature of the agreement", mentioned in article 1375 B.W., is decisive for the applicability of the custom, in the sense that in any given case it must be ascertained whether the agreement under discussion comes under the type of agreements in which the custom figures. Notwithstanding the fact that article 1383 B.W. does not mention

the „nature of the agreement", we held the „nature of the agreement" decisive for the applicability of the customary standard too.
Lastly we reviewed the relation between custom and equity. There we took the view, that a custom may be checked with equity only in a concrete case and that a custom should give way to equity if the application of the former leads to a clearly inequitable result. However we made the reservation that equity must not prevail at the cost of legal security, if non-enforcement of the custom would lead to serious legal insecurity and confusion among the parties concerned.

Chapter III.

In the third chapter we reviewed the meaning of articles 1375 and 1383 B.W. We argued that, in view of the text of article 1375 B.W. and its position in the Code, it is reasonable to suppose, that the legislator did not conceive of article 1375 B.W. as a rule of interpretation. However, complete certainty as to that cannot be obtained, because the interpretation article 1382 B.W. (Article 1159 C.c.) leads us to suppose, that custom has been intended as an instrument for determining the intentions of the contracting parties, at least if one assumes that the legislator did understand the pronouncement of POTHIER, from which article 1382 B.W. has been derived, in the right way. As to article 1383 B.W., we came to the conclusion that both its genesis and its text and place in the Code make it plausible that the legislator has meant this article as a rule of interpretation, basing the customary standard on the tacit intention of the contracting parties.
Having compared the custom of article 1375 B.W. with customs originated outside the domain of the law of contracts, as well as with customs which arise only after the conclusion of the agreement, during the execution thereof, with customs therefore that cannot possibly be construed as based on the intention of the contracting parties, we came to the conclusion that the custom of article 1375 B.W. must be considered as an autonomous source of law. We argued moreover that, in general, contracting parties do not have the custom of article 1375 in mind when contracting with each other, so that they can hardly have had an intention as to that. Therefore we defined the custom of article 1375 B.W. as a rule of law, applicable within a certain circle in virtue of the sole fact of making the contract without the intentions of the contracting parties playing any part therein.
We argued further that there is no valid reason to make a fundamental distinction, with respect to the basis of validity, between custom and customary standard, so that the customary standard too must be understood as a rule of law, applicable within a certain circle in virtue of the sole fact of making the contract. Both custom and customary standard therefore fulfil, with respect to the consequences of the contract not settled by the contracting parties, the same function as provisions of the law. This conclusion implies that article 1382 B.W. should be considered as non-existent.
We demonstrated our point of view with respect to article 1383 B.W. on the arbitration clause which has developed into a customary standard. Contrary to the current doctrine and case-law, which hold such clause applicable, because it is considered to be based on the tacit intention of the contracting parties and thus to comply with article 170 Grw. (Con-

stitutional Law), we argued that such a clause can only be enforced if it appears that its application was in fact intended by the contracting parties at the time of contract. The fact that an arbitration clause has developed into a customary standard is therefore in our opinion not in itself sufficient ground to make it enforceable.

Chapter IV.

In the fourth chapter we rendered exhaustively the case-law concerning the point whether a custom contra legem has any legal validity. It appeared that the decisions, particularly those of the Supreme Court, are more or less contradictory. The same discord appeared also in the literature. Having rejected the opinions of HOUWING, VAN OPSTALL and SCHOLTEN, we argued that one must determine in each particular case what results equity and reasonableness demand as to the conflict between law and custom or customary standard. For instance: custom or customary standard should prevail against the law, if the vast majority of the parties concerned complies with such custom or standard and counts on its compliance. For it would be inequitable and unreasonable to let the law prevail in such a case. We made an exception nevertheless for the eventuality that enforcement of the custom or customary standard would tend to lead to a clearly inequitable and unreasonable result. In such a case the law or a rule of equity — to be formulated by the court — should be prefered, unless — we added — non enforcement of the custom or customary standard would bring about serious legal insecurity and confusion among the parties concerned, in which case it would be better to enforce the custom or customary standard.

In our submission it makes no difference in principle whether the contrary provision of the law be directory or imperative. We stipulated nevertheless that in case of conflict with a provision of imperative law, much higher demands must be made upon the strength and firmness of the custom or customary standard than in case of conflict with a provision of directory law. We restricted our reasoning however to those customs contra legem, which only limit the effect of the regulation; we denied legal validity to law-abolishing customs because article 5 A.B. forbids that a custom abolish a law.

Chapter V.

In the fifth chapter we raised the question whether, as far as the law of evidence is concerned, custom and customary standard should be considered as a rule of law which the court should enforce ex officio or as a fact which must be alleged by the litigants and in case of dispute must be proved unless it should happen to be common knowledge. Contrary to the current doctrine and case-law we upheld the latter conception. In our opinion it was thereby of paramount importance that both with custom and with the customary standard emphasis falls on the factual element.

Chapter VI.

The sixth and final chapter we devoted to ius constituendum. There was the more reason for this, now that in connection with the complete revision of the Civil Code a bill has been already drafted — the bill for drawing up an introductory section of the new Civil Code — in which MEYERS has

formulated his ideas on the customary law. We developed objections against several dispositions of this draft bill.

In the first place we held the proposed provision that a custom may not prevail against a provision of imperative law to be undesirable because such a provision would do more harm than good. A provision in contrary sense would be just as undesirable because it would perhaps lead to the custom too easily prevailing against the imperative law. Having regard to the impossibility of arriving at an acceptable wording on this point, we therefore prefered that the law remain silent.

The proposed provision that a custom prevails against a provision of directory law we held to be too absolute and too formalistically worded. We therefore advocated a provision which opens up the possibility that a custom prevails against the directory law. This would ensure that the decision as to the prevailing force would be, in each and every case anew, up to the courts. In connection with the desirability of such a provision we advocated mentioning explicitly not only the custom, but also the customary standard, which is to be distinguished from, but identical in function with, the custom, thereby making it clear that the customary standard is not based on the tacit intention of the contracting parties. The same objections which we advanced to the aforementioned proposed provision referring to the relation between custom and provisions of directory law we developed also against the proposed provision referring to the relation between custom and equity; in this respect too, we would prefer a provision stating that a custom may be left unenforced if it would in actual fact lead to an inequitable result.

Lastly we expressed the opinion that in the new Civil Code it would no longer be necessary for the individual articles to refer to a custom, this point being taken into account in the introductory chapter of the Code.

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